

2017

**Espenscided Transport Corp., Plaintiff and Appellant vs. Wilsilre Insurance cojv.lpany; And Fleetwood Services, Inc., Defendants and Appellees**

Utah Supreme Court

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IN THE UTAH SUPREME COURT

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ESPENSCHIED TRANSPORT CORP.,

Plaintiff and Appellant

vs.

WILSHIRE INSURANCE  
COMPANY; and FLEETWOOD  
SERVICES, INC.,

Defendants and Appellees

Appellate Case No. 20160873-SC

APPEAL FROM A FINAL JUDGMENT  
THIRD JUDICIAL DISTRICT COURT, STATE OF UTAH  
CIVIL NO. 070913289, THE HON. PAIGE M. PETERSON

---

REPLY BRIEF OF APPELLANT

---

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FILED  
UTAH APPELLATE COURTS

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IN THE UTAH SUPREME COURT

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ESPENSCHIED TRANSPORT CORP.,

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## ARGUMENT

The arguments by appellees Fleetwood Services, Inc. ("Fleetwood") or Wilshire Insurance Company ("Wilshire") do not justify affirmance of the contested trial court's rulings, as explained below.

### **Fleetwood's Arguments**

1. *Appeal is moot and court is without jurisdiction.* Fleetwood first argues that because the underlying consent judgment supposedly expired on March 27, 2017, the appeal is moot and should be dismissed. Here, Fleetwood is mistaken for numerous reasons. First, Fleetwood's argument focuses solely on the judgment that was entered, and ignores Espenschied's separate settlement agreement. Espenschied remains bound by a settlement agreement in which it is obligated, among other things, to pay \$1.1 million (plus interest). Indeed, the judgment is not even mentioned in the settlement agreement, let alone dispositive of Espenschied's obligations. (*See* Addendum Exh. 3 hereto, R. 1771-1781.)

In any event, Fleetwood incorrectly assumes that the eight year limitation in either bringing an action on a judgment or in renewing the judgment is determinative of the issues. Plaintiff/appellant Espenschied Transport Corp. expressly agreed to toll the limitations and to waive the application of any limitation. It has likewise acknowledged the full validity of the judgment. *See* Addendum Exh. 1, ¶¶ 6-7, and Exh A attached thereto, ¶¶ 5-7. Accordingly, the



court in the consent judgment proceedings renewed the judgment on August 15, 2017. *See* Addendum Exh. 2.

This Court held that a renewed judgment “gives new life to a party's original judgment”. *Gildea v. Wells Fargo Bank, N.A.*, 2015 UT 11, ¶ 30, 347 P.3d 385. Thus, the original consent judgment based on the settlement between the Herrods and Espenschied has remained void throughout the entire course of this litigation.

Setting aside the fact that there has been a renewal of the judgment, Fleetwood’s arguments are misguided. The relevant statutes read as follows:

An action may be brought within eight years upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

Utah Code Anno. § 78B-2-311.

Judgments shall continue for eight years from the date of entry in a court unless previously satisfied or unless enforcement of the judgment is stayed in accordance with law.

Utah Code Anno. § 78B-5-202 (1).

A court of record may renew a judgment issued by a court if:

- (1) a motion is filed within the original action;
- (2) the motion is filed before the statute of limitations on the original judgment expires;
- (3) the motion includes an affidavit that contains an accounting of the original judgment and all post judgment payments, credits, and other adjustments which are provided for by law or are contained within the original judgment;
- (4) the facts in the supporting affidavit are determined by the court to be accurate and the affidavit affirms that notice was sent to the most current address known for the judgment debtor;

- (5) the time for responding to the motion has expired; and
- (6) the fee required by Utah Code Anno. Subsection 78A-2-301(1)(1) has been paid to the clerk of the court.

Utah Code Anno., § 78B-2-311.

Each of the above statutes has been met. Utah Code Anno. § 78B-2-311 requires that any action upon a judgment may be brought within eight years. The present action, which is an action to recover money to satisfy the judgment, was commenced on September 14, 2007. R. 1-11.

Utah Code Anno. § 78B-2-311 provides that a judgment shall continue for eight years unless “enforcement of the judgment is stayed”. Here, at the request of Espenschied and Fleetwood, the trial court stayed the present case on September 30, 2011, “this action shall be stayed until further order of the Court.” R. 1273-1276. The trial court never issued an order lifting the stay, but on April 11, 2012, the court issued an Order to Show Cause and Scheduling Conference. R. 1279-1280. At the hearing on May 23, 2012, the parties reported the status and advised the court of the stay. R. 1281.

On March 12, 2013, the court issued another order to show cause. R. 1285. Thereafter, Wilshire moved the trial court to continue the stay, to which Fleetwood joined. R.1308-1315; 1322-1323. Espenschied opposed the motions to continue the stay arguing that the Herrod judgment against Espenschied is independent of any federal action. R. 1327-1330. “Espenschied has already waited almost six

years to have its claims resolved. There is no justification for further delay and Espenschied is entitled to have its claims resolved.” *Id.* 1330. The court did not issue an order to lift the stay.

In another pretrial hearing on November 18, 2014, the parties reported to the court that the federal action was completed and the present action could proceed. R. 1369. Thus, this case was stayed for over three years, which would exceed any claimed expiration of the judgment.

As it relates to Utah Code Anno. § 78B-2-311, the judgment has been renewed. The only relevant condition for its renewal is that a motion be filed “before the statute of limitations on the original judgment expires”. The limitation period had not expired because: (1) Espenschied had agreed to toll and waive the running of the limitation; and (2) the present case had been stayed for over three years, which would extend the limitation period accordingly.

Utah has long accepted the consensual tolling of statutes of limitations. For example, a judgment debtor may agree to toll the limitation, or waive the application of a limitation. *LeFevre v. Stout (In re Estate of LeFevre)*, 2009 UT App 286, ¶ 31, 220 P.3d 476 (statute of limitations is a waivable defense); *Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 106 (Utah 1998) (same); *James v. Galetka*, 965 P.2d 567, 573-74 (Utah Ct. App. 1998). This Court has jurisdiction and the matter is not moot.

Here, Fleetwood and Wilshire have wrongfully denied Espenschied's claims. From the outset, this litigation has been to hold Fleetwood and Wilshire responsible for failing to provide the statutorily mandated trucker's insurance. The Herrods are part of the public for which such insurance is designed to protect. This litigation has been ongoing for nearly ten years. These claims against Fleetwood and Wilshire are the only means whereby the Herrods may recover for their personal injuries.

2. *Unpaid judgments are not damages.* Fleetwood argues that certain cases from other jurisdictions support its position that an unpaid judgment cannot be used to establish damages in claims against agents and brokers. Fleetwood relies on *Valentine v. Membrila Ins. Services, Inc.*, 118 Cal. App. 4th 462, 476, 13 Cal. Rptr. 3d 125, 136 (2004) ("Valentine"), and argues that its facts are similar to *DC-10 Entertainment, LLC v. Manor Insurance Agency, Inc.*, 308 P.3d 1223 (Colo. Ct. App. 2013), upon which Espenschied relies. Fleetwood then points out that the Valentine case arrives at an opposite result.

Fleetwood's argument is misplaced. *Valentine* offered four reasons why it believed that a judgment coupled with a covenant not to execute does not give rise to recovery against a broker. First, where the facts needed to determine whether an insurer has a duty to defend are easy to assemble, there is uncertainty about when a broker's duty to defend arises. *Id.* at 473. Second, insurers acting in bad faith are

more blameworthy than brokers who negligently fail to procure insurance, and it is this blameworthiness that justifies a procedure that, in the opinion of the court, invites collusion and fraud. *Id.* at 474. Third, unlike an insurer, whose bargaining strength dwarfs that of an insured, a broker may have less knowledge and sophistication concerning a specialized area of commercial insurance than its client. *Id.* Fourth, a stipulated judgment, standing alone, is not a fair barometer of the damages caused by a broker's negligence. *Id.* at 476. These reasons are unpersuasive or otherwise inapposite to the facts at hand.

*Valentine's* discussion about a broker not knowing when its duty to defend has arisen is inapposite to the facts at hand. Unlike the case in *Valentine*, Espenschied's attorney specifically requested that Fleetwood defend it.

*Valentine's* discussion of the blameworthiness of an insurer versus a broker is also not applicable here. An insurer's decision to deny coverage is not always the result of bad faith. An insurer can err in denying coverage, without acting in bad faith, if the denial of coverage is fairly debatable. Such a denial would be no more blameworthy than negligently failing to procure insurance, especially where, as is the case with Espenschied and Fleetwood, there is a twenty-year history of reliance and trust.

*Valentine's* third reason regarding the potential sophistication of an insured over a broker is also inapposite to Espenschied's facts. Espenschied had relied on

Fleetwood's knowledge and expertise for over twenty years. Espenschied concentrated on trucking and it was very good at serving its customers. Its owners and employees knew very little about insurance other than that they wanted all of their equipment covered. Fleetwood was more knowledgeable about the particularities of Wilshire's policies, having served as Wilshire's exclusive producer in the Salt Lake City and being one of Wilshire's largest Utah producer. Viewing the facts most favorably to Espenschied leads to the conclusion that Fleetwood was much more sophisticated and knowledgeable about the coverage Espenschied should have.

*Valentine's* fourth reason for rejecting consent judgments relates to the fairness that it may not reflect the true damages. Here, the magnitude of damages alleged by Herrods and the likelihood of a finding of liability on Espenschied was high. The damages of the Herrods' economist placed the present value of just the economic losses between \$16,141,963 and \$21,634,590. Non-economic damages would be in addition to this figure. There were also personal injuries to the other members of the Herrod family. Even a small percentage of fault such as 20% would equate to economic losses in the range of over \$3 million against Espenschied. A reasonable argument could be made that the settlement, which capped the exposure, would also benefit Fleetwood.

Compelling policy reasons would justify shifting the risk to the agent or broker, who typically has errors and omission liability insurance to cover its own negligence. The agents or brokers liability for failure to procure insurance should not turn on whether the customer is able to pay a settlement or judgment.

**Wilshire's Arguments.**

1. *Complaint fails to allege that Fleetwood is Wilshire's agent.* Wilshire argues that this Court should not consider Espenschied's argument that Wilshire is liable for the conduct of Fleetwood, its agent, because the complaint does not explicitly allege that Fleetwood was the agent of Wilshire. Wilshire Brief, pp. 24-25. Wilshire concedes, however, that the trial court did not make any ruling in this regard (*id.*, p. 24); rather the trial court addressed the issue of agency on the merits. Nonetheless, to support its argument, Wilshire cites to *Big Sky Fin. Co. v. Lawyers Title Ins. Corp.*, 2006 UT App. 337. In this case, however, the trial court and Utah Court of Appeals ruled directly on the adequacy of the complaint rather than ruling on the merits of the agency issue.

In the present case, the trial court decided to directly address the merits of the agency issue rather than rule on the adequacy of the complaint. In fact, the order of the trial court (which was prepared by Wilshire) never even mentions the complaint in this regard. R. 3183-3189.

Under U.R.Civ.P. 15(b)(1), if the matter which is not raised in the pleadings is tried, it is considered part of the pleadings.

When an issue not raised in the pleadings is tried by the parties' express or implied consent, it *must be treated in all respects as if raised in the pleadings*. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But *failure to amend does not affect the result of the trial of that issue*.

*Id.*

Based on the extensive discovery regarding whether Fleetwood was Wilshire's agent, the agency issue was extensively briefed below by both Espenschied and Wilshire, attaching depositions and documents to support their respective positions. R. 1846-1847, 2607-2610, and 2838-2839. In Wilshire's Statement of Facts section in its motion for summary judgment, Wilshire describes the facts in detail from which it then argues that Fleetwood was not its agent. R. 1828-1832. The trial court "tried" the agency issue and made specific findings and conclusions regarding agency without mentioning the lack of allegations in the complaint. Under Rule 15 (b)(1), this matter has been tried as if the agency issue was pled. There is no ruling from the trial court for this court to review regarding the adequacy of the complaint.

2. *Reasonable expectations regarding Fleetwood as Wilshire's agent.*

Wilshire argues that Utah has rejected the reasonable expectation doctrine. This argument, however, is misplaced. Utah has rejected the doctrine of reasonable



expectations *when applied to invalidate provisions in an insurance contract*. *Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798, 804 (Utah 1992). This, however, misses Espenschied's point.

Espenschied argues that it is entitled to reasonably rely on Fleetwood's representations and the historical course of dealings with Fleetwood over a twenty-year period. If Fleetwood is also the agent of Wilshire, the reliance is equally binding on Wilshire.

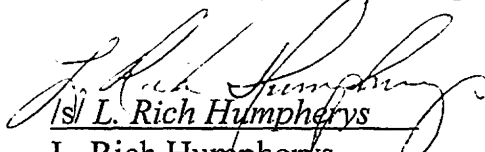
3. *Fleetwood not acting as Wilshire's agent.* Wilshire argues that Fleetwood is not its agent, relying on the case of *Vina v. Jefferson Ins. Co. of N.Y.*, 761 P.2d 581 (Utah App. 1988). However, in finding that an insurance broker was not an agent for an insurer, the court in *Vina* did not base its decision on the mere fact that the broker did not have authority to bind insurance. 761 P.2d at 586. The *Vina* court, instead, looked at all the facts and circumstances of the case, including the fact that the broker had no prior dealings with the insurer who issued the policy to the plaintiffs. *Id.* Here, Fleetwood had extensive dealings with Wilshire, and according to the agency agreement, had authority to bind coverage within the guidelines set out by Wilshire. R. 2636. In any event, there is no Utah law dictating that the principles of agency *only* apply to an agent with binding authority. At a very minimum, there are issues of fact that preclude summary judgment on this issue.

## CONCLUSION

For the reasons set forth above, appellant Espenschied respectfully requests that this Court reverse the summary judgments in favor of both Fleetwood and Wilshire and remand the case for trial.

DATED this 1st day of September, 2017.

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L. Rich Humpherys

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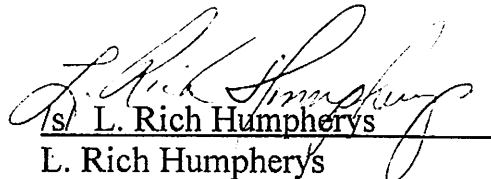
## CERTIFICATE OF SERVICE

This is to certify that on the 1st day of September, 2017, a copy of the foregoing **REPLY BRIEF OF APPELLANT** was emailed to the following and subsequently two copies were mailed to:

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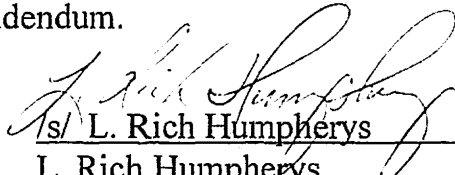
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s/ L. Rich Humpherys  
L. Rich Humpherys

## CERTIFICATION OF COMPLIANCE

Pursuant to U.R.A.P. 24(f), counsel for Plaintiffs/Appellants hereby certifies that the foregoing brief contains a proportionally spaced 14-point typeface and contains 2,408 words, as determined by an automatic word count feature on Microsoft Word 2010, including headings and footnotes, and excluding the table of contents, table of authorities, and addendum.

  
/s/ L. Rich Humpherys  
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# ADDENDUM



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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

CATHERINE HERROD, SCOTT HERROD,  
TAYLOR HERROD, MATTHEW  
HERROD, ELIZABETH HERROD, NILES  
HERROD AND JANET HERROD,

Plaintiffs,

vs.

ESPENSCHIED TRANSPORT  
CORPORATION., a Utah Corporation, aka  
ESPENSCHIED TRANSPORT, INC.

Defendant.

**STIPULATION AND JOINT MOTION  
TO RENEW JUDGMENT**

Misc. No. 090905058

The parties hereby stipulate and jointly move the court as follows:

## STIPULATION

1. On or about June 26, 2007, Espenschied Transport Corp entered into a settlement agreement with Catherine P. Herrod, (individually and on behalf of Scott Herrod, Taylor Herrod, Matthew Herrod and Elizabeth Herrod, minors), Niles Herrod and Janet Herrod ("Herrods") regarding the claims that the Herrods had against Espenschied for wrongful death and personal injuries.

2. As a part of the settlement agreement, Espenschied agreed to pay Herrods the amount of \$1,100,000 together with interest at the rate of 10% per annum from June 26, 2007, (the date of the settlement agreement) until paid. Herrods agreed to collect this amount owing from Espenschied's liability insurer, Wilshire Insurance Company ("Wilshire") and/or Fleetwood Services, Inc., Espenschied's insurance broker ("Fleetwood").

3. Pursuant to the agreement, Espenschied agreed to take what measures were necessary and to fully cooperate in pursuing these claims against Wilshire and Fleetwood. As part of this agreement, Espenschied consented to the judgment which was entered in the above matter executed by this court on March 27, 2009 and entered on April 3, 2009 (the "Judgment").

4. Since that time, Espenschied has been engaged in pursuing the claims against Wilshire and Fleetwood in the action entitled *Espenschied Transport Corp. v. Wilshire Insurance Company and Fleetwood Services, Inc.*, Court No. 070913289, in the Third District Court for Salt Lake County, State of Utah, presently on appeal to the Utah Supreme Court, Case No. 20160873-SC ("Espenschied Claims").



5. To eliminate any issue relating to the validity of the Judgment, the parties seek to have the Judgment herein renewed. The Statute of Limitations period of eight years to renew a judgment has expired; however, Espenschied acknowledges that it has waived the Statute of Limitation defense, agreed that the Statute of Limitations on the Judgment is tolled while the Espenschied Claims are being pursued against Wilshire and Fleetwood, and agreed that said Judgment remains enforceable and valid. Throughout the eight year period, I have also repeatedly acknowledged Espenschied's obligation to the Herrods in writing, in my depositions, and in the pleadings filed in the case involving Espenschied's Claims against Wilshire and Fleetwood. See Declaration of Bryan Espenschied, attached as Exhibit A hereto.

6. The amount owing under the Judgment is justly due to the Herrods. Since the payment of the Judgment is based on the success of the Espenschied Claims, Espenschied has not paid any amount toward the Judgment and the full amount plus interest remains owing.

7. Espenschied acknowledges and agrees that the Judgment should be renewed to avoid any argument by Wilshire or Fleetwood that Espenschied has suffered no damage and cannot pursue the Espenschied Claims.

## JOINT MOTION

Pursuant to the above stipulation, the parties jointly move the court to execute and enter a renewed judgment based on the same terms as the original Judgment. Said proposed judgment is filed herewith and is approved by both parties.

Dated this 14<sup>th</sup> day of August, 2017.


HUMPHERY'S LAW, PLLC

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L. Rich Humpherys

CHRISTENSEN & JENSEN, PC

/s/ Karra J. Porter  
Karra J. Porter  
*Attorneys for Catherine P. Herrod,  
(individually and on behalf of Scott Herrod,  
Taylor Herrod, Matthew Herrod and  
Elizabeth Herrod, minors), Niles Herrod  
and Janet Herrod ("Herrods")*

ESPENSCHIED TRANSPORT CORP

By   
Bryan J. Espenschied  
Authorized Agent for Espenschied  
Transport Corp.

### CERTIFICATE OF SERVICE

On this 14<sup>th</sup> day of August, 2017, I hereby certify that the original and copy of the above STIPULATION AND JOINT MOTION TO RENEW JUDGMENT was personally delivered to Bryan J. Espenschied and that he executed and approved the same for and on behalf of Espenschied Transport Corp.

L. Rich Humpherys

# EXHIBIT A

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IN THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

CATHERINE HERROD, SCOTT HERROD,  
TAYLOR HERROD, MATTHEW  
HERROD, ELIZABETH HERROD, NILES  
HERROD AND JANET HERROD,

Plaintiffs,

vs.

ESPENSCHIED TRANSPORT  
CORPORATION., a Utah Corporation, aka  
ESPENSCHIED TRANSPORT, INC.

Defendant.

**DECLARATION OF BRYAN J.  
ESPENSCHIED**

Misc. No. 090905058

I, Bryan J. Espenschied, hereby declare as follows:

1. During all relevant times, I have been a principal and part owner of Espenschied Transport Corp, a Utah Corporation ("Espenschied"). This company has ceased doing business, except for completing the resolution of the above action and related matters. I have been and am the authorized representative to speak and act on behalf of Espenschied in this matter.

2. To settle the wrongful death and personal injury claims of the above mentioned Plaintiffs (the "Herrods") against Espenschied relating to a very tragic accident involving a trailer owned by Espenschied, Espenschied entered into a settlement agreement with the above named

Plaintiffs on June 26, 2007. As a part of the settlement agreement, Espenschied agreed to pay Herrods the amount of \$1,100,000 together with interest at the rate of 10% per annum from June 26, 2007, (the date of the settlement agreement) until paid. Herrods agreed to collect this amount owing from Espenschied's liability insurer, Wilshire Insurance Company ("Wilshire") and/or Fleetwood Services, Inc., Espenschied's insurance broker ("Fleetwood").

3. Pursuant to the agreement, Espenschied agreed to take what measures were necessary and to fully cooperate in pursuing these claims against Wilshire and Fleetwood. As part of this agreement, Espenschied consented to the judgment which was entered in the above matter executed by this court on March 27, 2009 and entered on April 3, 2009 (the "Judgment").

4. Since that time, Espenschied has been engaged in pursuing the claims against Wilshire and Fleetwood in the action entitled *Espenschied Transport Corp. v. Wilshire Insurance Company and Fleetwood Services, Inc.*, Court No. 070913289, in the Third District Court for Salt Lake County, State of Utah, presently on appeal to the Utah Supreme Court, Case No. 20160873-SC ("Espenschied Claims").

5. I understand that there is a Statute of Limitations of eight years on a claim to renew a judgment, as found in Section 78B-2-311 of the Utah Code. The Statute of Limitations period of eight years to renew the Judgment has expired; however, Espenschied has waived the Statute of Limitation and agreed that the Statute of Limitations on the Judgment is tolled while the Espenschied Claims are being pursued. Espenschied acknowledges and agrees that said Judgment remains enforceable and valid. Espenschied has understood, expressed and intended from the outset of the settlement that the Herrods were relying on Espenschied's cooperation to have the judgment valid as long as the Espenschied Claims were pending against Wilshire and Fleetwood. Espenschied has therefore agreed to waive or toll any statute of limitation that would

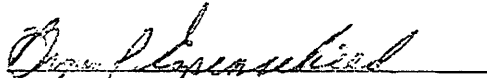
affect the judgment's validity. Throughout the eight year period, I have also repeatedly acknowledged Espenschied's obligation to the Herrods in writing, in my depositions, and in the pleadings filed in the case involving Espenschied's Claims against Wilshire and Fleetwood.

6. The amount owing under the Judgment is justly due to the Herrods. Since the payment of the Judgment is based on the success of the Espenschied Claims against Wilshire and Fleetwood, Espenschied has not paid any amount toward the Judgment and the full amount plus interest remains owing.

7. Espenschied acknowledges and agrees that the Judgment should be renewed.

I declare under criminal penalty of the State of Utah and applicable federal laws that the above is true and correct to the best of my knowledge, understanding and belief.

Dated this 14<sup>th</sup> day of August, 2017



Bryan J. Espenschied  
Authorized agent and representative of Espenschied  
Transport Corp.,

# EXHIBIT 2



L. Rich Humpherys, 1582  
Humpherys Law PLLC  
36 South State Street, Suite 1900  
Salt Lake City, UT 84111  
Tel: 801 239 3140

Karra J. Porter  
CHRISTENSEN & JENSEN, P.C.  
257 East 200 South, Suite 1900  
Salt Lake City, Utah 84111  
Telephone: (801) 323-5000  
Facsimile: (801) 355-3472  
*Attorneys for Herrods*

IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

CATHERINE HERROD, SCOTT HERROD,  
TAYLOR HERROD, MATTHEW  
HERROD, ELIZABETH HERROD, NILES  
HERROD AND JANET HERROD,

Plaintiffs,

vs.

ESPENSCHIED TRANSPORT  
CORPORATION., a Utah Corporation, aka  
ESPENSCHIED TRANSPORT, INC.

Defendant.

**JUDGMENT**

Misc. No. 090905058

Based upon the Joint Stipulation and Motion to Renew the Judgement and the  
Declaration of the Defendant filed herein, the Court hereby grants the motion and issues

the following judgment.

The JUDGMENT herein executed by the court on March 27, 2009 and entered in the Registry of Judgments on the 3<sup>rd</sup> day of April, 2009, against Espenschied Transport Corp, in favor of Catherine Herrod, Scott Herrod, Taylor Herrod, Matthew Herrod, Elizabeth Herrod, Niles Herrod and Janet Herrod shall be renewed based on the same terms and conditions as stated in the original judgment.

Accordingly, Catherine Herrod, Scott Herrod, Taylor Herrod, Matthew Herrod, Elizabeth Herrod, Niles Herrod and Janet Herrod shall have JUDGMENT against Espenschied Transport Corp, for the amount of \$1,292,499.99, together with post judgment interest from March 27, 2009, at the rate of 10% per annum, until paid.

**\*\*\*Executed and entered by the Court as indicated by the date  
and seal at the top of the first page\*\*\***

Approved as to form and content:

/s/ Bryan J. Espenschied (signature on file)  
Bryan J. Espenschied  
Authorized Agent for Espenschied  
Transport Corp

# EXHIBIT 3

## EXHIBIT A TO CONTINGENCY FEE AGREEMENT

### SETTLEMENT AGREEMENT

Agreement is made this 26<sup>th</sup> day of June, 2007, between and among Catherine P. Herrod, (individually and on behalf of Scott Herrod, Taylor Herrod, Matthew Herrod and Elizabeth Herrod), Niles Herrod and Janet Herrod ("Herrods") and Espenschied Transport Corporation, J. Richard Stark, and Bryan J. Espenschied ("Espenschied").

WHEREAS, Herrods are the heirs of Kimball Herrod and the owners of wrongful death and/or personal injury claims arising out of an automobile accident which occurred January 30, 2005, on Interstate 15 at or near Woods Cross, Utah, when dual tires on a 1986 Timpfe trailer ("Trailer") owned by Espenschied came off their axle at freeway speeds, crossed the median and hit the Herrods' vehicle, killing Kimball Herrod ("Accident");

WHEREAS, prior to the Accident, Espenschied had entered into an agreement to lease and later sell the Trailer and other equipment to DATS Trucking, Inc. ("DATS"), wherein DATS agreed to provide Espenschied with insurance and to indemnify Espenschied for any claims arising out of the use or maintenance of the Trailer and other equipment subject to the lease and sale;

WHEREAS, DATS has denied any liability to Espenschied and contests Espenschied's claims for insurance and indemnity;

WHEREAS, prior to the accident, Espenschied had requested of its insurance agent/broker, Fleetwood Services, Inc. ("Fleetwood") and Fleetwood agreed to obtain automobile liability insurance for the Trailer and for Espenschied's other equipment with coverage meeting the insurance requirements of Espenschied's customers as well as the federal law;

WHEREAS, Espenschied claims that Wilshire Insurance Company, or one of its affiliated companies, ("Wilshire") issued a motor vehicle liability policy to Espenschied, to insure the Trailer and other equipment of Espenschied;

WHEREAS, Espenschied gave notice of the Herrods' claims to its insurer, Wilshire, whereupon, Wilshire denied any responsibility for such claims and refused to defend Espenschied on the grounds that it provided no coverage for the Trailer;

WHEREAS, Espenschied then made claims against its agent/broker Fleetwood for purportedly failing to secure the requested coverage for the Trailer, however, Fleetwood likewise denied any responsibility for the claim;

WHEREAS, Espenschied has been required to incur defense costs, including attorney's fees, court costs and related expenses, in defending Espenschied against the Herrods' claims and in pursuing cross-claims against DATS ("Defense Costs");

WHEREAS, Espenschied faces uncertain but potentially serious exposure from the Herrods' claims and desires through a settlement with the Herrods to eliminate the possible exposure and the ongoing Defense Costs;

NOW, THEREFORE, for the terms and conditions set forth below and other good and valuable consideration, the parties agree as follows:

1. Herrods agree to settle all claims they may have against Espenschied for the amount of \$1,100,000, together with interest at the rate of 10% per annum which will accrue from the date hereof until paid.
2. Herrods agree to withhold collection on the non-insurance assets (excluding the claims against third parties, set forth below) of Espenschied until such time as said claims against the third parties have been fully settled, waived, released, litigated and/or resolved (including

appeals). Regardless of whether there may be any recovery, Herrods shall never pursue collection of any of the \$1,100,000 owing under this agreement against Bryan J. Espenschied and/or J. Richard Stark, and shall never pursue Espenschied Transport Corporation for any amount owing if the effect of so doing would expose the personal assets of either Bryan J. Espenschied or J. Richard Stark.

3. Espenschied shall assign to Herrods all rights and claims it may have against DATS, excluding however claims for Defense Costs, as set forth in Exhibit 1 attached hereto ("Assignment of Claims").

4. Espenschied shall fully pursue and prosecute all claims it may have against Wilshire, Fleetwood, DATS (to the extent assigned), and any other third party (collectively referred to as "Third Parties"), for liability to Espenschied arising from or relating to the Accident and/or the Herrods claims and/or efforts or the lack thereof to secure liability insurance coverage on the Trailer and other equipment. Espenschied shall fully cooperate and assist the attorneys in pursuing said claims against Third Parties. This duty to cooperate is a specifically bargained for term in this agreement, the violation of which shall be considered a material breach of the agreement. This duty to cooperate shall include, but not be limited to, authorizing Herrods to consult with and use the experts Espenschied has retained in defense to the Herrods lawsuit.

5. Espenschied will retain the law firm of CHRISTENSEN & JENSEN, P.C., to pursue Espenschied's claims against the Third Parties, by executing the Contingency Fee Agreement to which this Settlement Agreement is attached as Exhibit A.

6. The recovery, either from a partial settlement or from full resolution of Espenschied's claims against the Third Parties (or any of them), will be applied and distributed as follows:



- a. to the costs of litigation, including attorneys' fees and litigation expenses, as described in the Contingency Fee Agreement;
- b. to the Herrods until the full amount owing under this agreement has been paid;
- c. the remaining balance, if any, after the above distributions shall be paid to Espenschied.

7. All decisions regarding settlement (including the amount), appeal, dismissal, waiver, release, abandonment, mediation, arbitration, witnesses, experts, and any other decisions regarding the claims and/or litigation against the Third Parties will be determined by the Herrods in their sole discretion, unless or until such time as the amount owing hereunder to the Herrods, including interest, is actually paid in full. This means that the Herrods will retain control of all matters regarding Espenschied's claims against the Third Parties, until the amount owing hereunder has been fully paid. Espenschied shall not have the right to object to or consent to any settlement or resolution of these claims. In the event the Herrods elect to settle all of Espenschied's claims for an amount less than the full amount owing hereunder, the Herrods shall provide Espenschied with a written satisfaction of all amounts owing hereunder and shall have no further claims against Espenschied. It is expressly agreed by the parties that the satisfaction of the amount owing hereunder is the goal and primary purpose of this Settlement Agreement.

8. Notwithstanding the above, Espenschied's indemnity claim against DATS for its Defense Costs shall not be subject to the terms of this agreement.

9. This contract shall be governed by the laws of the state of Utah.

10. The parties shall execute the necessary documents to effect the terms of any settlement of Espenschied's claims against the Third Parties. This will include Espenschied's

signing a full and complete release of all claims against any Third Parties, and/or anyone else requested by the Herrods, and a dismissal of any litigation, regardless of whether or not Espenschied receives any amount relating to these claims.

11. Espenschied represents and warrants that it has not released or waived any of its claims against the Third Parties and that it will not do so without the Herrods' written consent.

12. Espenschied further represents and warrants that no one who is not a party to this agreement has any interest in Espenschied's claims against the Third Parties and Espenschied will not agree to provide anyone else with any interest in such claims without the Herrods' written consent.

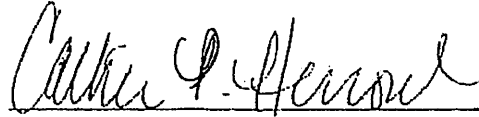
#### **CONFLICT OF INTEREST WAIVER**

13. The parties hereby recognize that a potential conflict of interest exists in having the law firm of CHRISTENSEN & JENSEN, P.C. act as attorneys for Espenschied when the attorneys also represent and have represented the interests of the Herrods in pursuing their personal injury and wrongful death claims. Nevertheless, Espenschied recognizes that recovery to Espenschied is incidental to the payment of the amount owing hereunder and that it is in Espenschied's best interest to have this amount fully paid. Therefore, having fully explored with separate counsel the meaning and extent of this conflict of interest, **Espenschied hereby waives any conflict of interest, and agrees to execute the Contingency Fee Agreement with CHRISTENSEN & JENSEN, P.C.** This is being done without duress and without regard to any representations on the part of the Herrods or CHRISTENSEN & JENSEN, P.C. Upon execution of this Settlement Agreement and the Contingency Fee Agreement, to which this is made a part, the interests of Espenschied and the Herrods in pursuing the claims against the

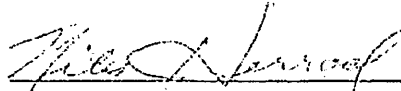


Third Parties for the satisfaction of the amounts owing hereunder, will be fully aligned.

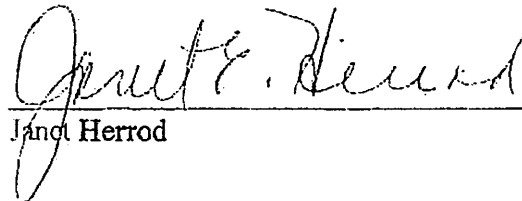
Dated this 26 day of June, 2007.



Catherine P. Herrod, individually and on  
behalf of Scott Herrod, Taylor Herrod,  
Matthew Herrod and Elizabeth Herrod

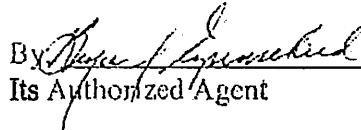


Niles Herrod

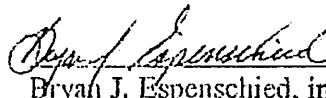


Janet Herrod

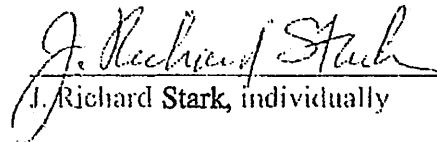
ESPENSCHIED TRANSPORT  
CORPORATION



Its Authorized Agent



Bryan J. Espenschied, individually



J. Richard Stark, individually

## **Exhibit 1 to Settlement Agreement**

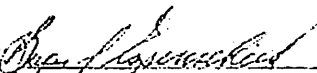
## Assignment of Claims

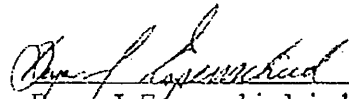
Espenschied Transport Corporation, Bryan J. Espenschied and J. Richard Stark (hereafter collectively referred to as "Assignors") hereby sell, assign and transfer to Catherine Herrod, individually and as parent and guardian of Scott Herrod, Taylor Herrod, Matthew Herrod and Elizabeth Herrod, and Niles and Janet Herrod (hereafter collectively referred to as "Herrods") any and all claims, rights and other interests Assignors may have against DATS Trucking, Inc. as it relates to the lease and/or sale of the trailer that was involved in the accident of January 30, 2005, wherein Kimball Herrod was killed, including but not limited to, claims for liability insurance, indemnity, consequential damages relating to the lack of coverage, and any other related claims. However, this assignment does not include Assignors' claim for attorneys fees and costs in defending the claims of the Herrods and pursuing the cross-claims against DATS Trucking, Inc., in the matter of *Catherine Herrod, et al. v. DATS Trucking, Inc.*, et al., Civil No. 060700384, in the Second Judicial District Court, in Davis County, Utah, which specific claim Assignors reserve.

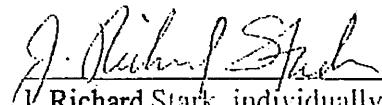
Assignors acknowledge that by and through this assignment, Herrods shall have the right to pursue, settle, collect and recover on any of these assigned claims without the consent or authority of the Assignors. The Assignors shall execute any additional documents necessary to accomplish the purpose of this assignment. To the extent this assignment of claims is invalid in any regard, Assignors agree to pursue said claims in behalf of the Herrods, at Herrods' direction and expense.

Dated this 26 day of June, 2007.

ESPENSCHIED TRANSPORT  
CORPORATION

By   
Its Authorized Agent

  
Bryan J. Espenschied, individually

  
J. Richard Stark, individually

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## UTAH STANDARDS OF PROFESSIONALISM and CIVILITY

1. Lawyers shall advance the legitimate interests of their clients, without reflecting any ill-will that clients may have for their adversaries, even if called upon to do so by another. Instead, lawyers shall treat all other counsel, parties, judges, witnesses, and other participants in all proceedings in a courteous and dignified manner.

2. Lawyers shall advise their clients that civility, courtesy, and fair dealing are expected. They are tools for effective advocacy and not signs of weakness. Clients have no right to demand that lawyers abuse anyone or engage in any offensive or improper conduct.

3. Lawyers shall not, without an adequate factual basis, attribute to other counsel or the court improper motive, purpose, or conduct. Lawyers should avoid hostile, demeaning, or humiliating words in written and oral communications with adversaries. Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under controlling substantive law.

4. Lawyers shall never knowingly attribute to other counsel a position or claim that counsel has not taken or seek to create such an unjustified inference or otherwise seek to create a "record" that has not occurred.

5. Lawyers shall not lightly seek sanctions and will never seek sanctions against or disqualification of another lawyer for any improper purpose.

6. Lawyers shall adhere to their express promises and agreements, oral or written, and to all commitments reasonably implied by the circumstances or by local custom.

7. When committing oral understandings to writing, lawyers shall do so accurately and completely. They shall provide other counsel a copy for review, and never include substantive matters upon which there has been no agreement, without explicitly advising other counsel. As drafts are exchanged, lawyers shall bring to the attention of other counsel changes from prior drafts.

8. When permitted or required by court rule or otherwise, lawyers shall draft orders that accurately and completely reflect the court's ruling. Lawyers shall promptly prepare and submit proposed orders to other counsel and attempt to reconcile any differences before the proposed orders and any objections are presented to the court.

9. Lawyers shall not hold out the potential of settlement for the purpose of foreclosing discovery, delaying trial, or obtaining other unfair advantage, and lawyers shall timely respond to any offer of settlement or inform opposing counsel that a response has not been authorized by the client.

## EXHIBIT B TO CONTINGENCY FEE AGREEMENT

10. Lawyers shall make good faith efforts to resolve by stipulation undisputed relevant matters, particularly when it is obvious such matters can be proven, unless there is a sound advocacy basis for not doing so.

11. Lawyers shall avoid impermissible *ex parte* communications.

12. Lawyers shall not send the court or its staff correspondence between counsel, unless such correspondence is relevant to an issue currently pending before the court and the proper evidentiary foundations are met or as such correspondence is specifically invited by the court.

13. Lawyers shall not knowingly file or serve motions, pleadings or other papers at a time calculated to unfairly limit other counsel's opportunity to respond or to take other unfair advantage of an opponent, or in a manner intended to take advantage of another lawyer's unavailability.

14. Lawyers shall advise their clients that they reserve the right to determine whether to grant accommodations to other counsel in all matters not directly affecting the merits of the cause or prejudicing the client's rights, such as extensions of time, continuances, adjournments, and admissions of facts. Lawyers shall agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect their client's legitimate rights. Lawyers shall never request an extension of time solely for the purpose of delay or to obtain a tactical advantage.

15. Lawyers shall endeavor to consult with other counsel so that depositions, hearings, and conferences are scheduled at mutually convenient times. Lawyers shall never request a scheduling change for tactical or unfair purpose. If a scheduling change becomes necessary, lawyers shall notify other counsel and the court immediately. If other counsel requires a scheduling change, lawyers shall cooperate in making any reasonable adjustments.

16. Lawyers shall not cause the entry of a default without first notifying other counsel whose identity is known, unless their client's legitimate rights could be adversely affected.

17. Lawyers shall not use or oppose discovery for the purpose of harassment or to burden an opponent with increased litigation expense. Lawyers shall not object to discovery or inappropriately assert a privilege for the purpose of withholding or delaying the disclosure of relevant and non-protected information.

18. During depositions lawyers shall not attempt to obstruct the interrogator or object to questions unless reasonably intended to preserve an objection or protect a privilege for resolution by the court. "Speaking objections" designed to coach a witness

#### **EXHIBIT B TO CONTINGENCY FEE AGREEMENT**

are impermissible. During depositions or conferences, lawyers shall engage only in conduct that would be appropriate in the presence of a judge.

19. In responding to document requests and interrogatories, lawyers shall not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-protected documents or information, nor shall they produce documents in a manner designed to obscure their source, create confusion, or hide the existence of particular documents.

20. Lawyers shall not authorize or encourage their clients or anyone under their direction or supervision to engage in conduct proscribed by these Standards.

#### **EXHIBIT B TO CONTINGENCY FEE AGREEMENT**